

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

FILED
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CLERK

PATRICK FERGAL MCSHARRY,

Plaintiff,

v.

UNUMPROVIDENT CORPORATION,

Defendant.

CIVIL ACTION FILE

NO. 1:02-CV-208

(Edgar/Carter)

JOYCE A. KAKKIS, M.D.,

Plaintiff,

CASE NO. CV00-08297

v.

PROVIDENT MUTUAL LIFE
INSURANCE COMPANY OF
PHILADELPHIA, et al.,

Defendants

ROBERT L. CARR,

Plaintiff,

CASE NO. CV01-07380 GAF
(C.D. CAL.)

v.

UNUMPROVIDENT CORPORATION,
THE PAUL REVERE LIFE INSURANCE
COMPANY, et al.,

Defendants.

DOUGLAS HOUSTON,

Plaintiff,

v.

PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY, et al.,

Defendants.

CASE NO. CV01-09298 DDP
(C.D. CAL.)

DAVID L. JAKWAY,

Plaintiff,

v.

UNUMPROVIDENT CORPORATION,

Defendant.

CASE NO. CV01-06753 AHM
(C.D. CAL.)

MITCHELL S. BURNS,

Plaintiff,

v.

THE PAUL REVERE LIFE INSURANCE
COMPANY, et al.,

Defendants.

CASE NO. 00-00804 SOM/BMK
(C.D. CAW.)

SUSAN CHUN, M.D.,

Plaintiff,

v.

PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY, et al.,

Defendants,

CASE NO. 1 00586058 DDP
(C.D. CAL.)

ARTHUR L. FRIES,

Plaintiff,

v.

PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY, et al.,

Defendants.

CASE NO. CV-02-2583 AHM
(C.D. CAL.)

SIMON ZEMEL,

Plaintiff,

v.

PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY,

Defendant.

CASE NO. CV01-00994 TLH
(C.D. CAL.)

PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY,

Plaintiff,

v.

RICHARD J. VAN GEMERT,

Defendant.

CASE NO. 01-09498 SVW
(C.D. CAL.)

DR. HOWARD E. LEFTON,

Plaintiff,

v.

THE PAUL REVERE LIFE INSURANCE
COMPANY, et al.,

Defendants.

CASE NO. SACV-01-1179 AHS
(C.D. CAL.)

DR. MONIKA HENSCHKE,

Plaintiff,

v.

PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY, et al.,

Defendants.

CASE NO. C-01-10410 VRM
(N.D. CAL.)

THOMAS SALDI,

Plaintiff,

v.

PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY,

Defendant.

CASE NO. 99-CV-6563
(E.D. PA.)

DONALD M. PACHUTA, M.D.,

Plaintiff,

v.

UNUMPROVIDENT CORPORATION,
et al.,

Defendants,

CASE NO. CV01-00199 ACK BMK
(U.S.D.C. HI.)

ROSEMARY WRIGHT,

Plaintiff,

v.

UNUM LIFE INSURANCE COMPANY;
UNUM/PROVIDENT CORPORATION,

Defendants,

CASE NO. CIV-02-0171 PHX FJM
(D.C. AZ.)

ROBERT C. KELLMAN,

Plaintiff,

v.

UNUMPROVIDENT CORPORATION,
et al.,

Defendants.

CASE NO. C01-01376 SBA (N.D. CAL.)

ROBERT D. LIGORSKY,

Plaintiff,

v.

THE PAUL REVERE LIFE INSURANCE
COMPANY, et al.,

Defendants.

CASE NO. CIV-00-1318 PHX MHM
(D.C. AZ.)

JOANNE CEIMO,

Plaintiff,

v.

GENERAL AMERICAN LIFE
INSURANCE COMPANY, et al.,

Defendants.

CASE NO. CV00-1386 PHX SMM
(D.C. AZ.)

CATHERINE KELLY

Plaintiff,

v.

THE EQUITABLE LIFE
ASSURANCE SOCIETY, et al.,
Defendants.

CASE NO. L-04722-01 (N.J. S.CT.)

ORDER

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U.S. DISTRICT COURT
EASTERN DIST. TENN.

Defendants Provident Mutual Life Insurance Company of Philadelphia, Provident Life and Accident Insurance Company of Philadelphia, Provident Life and Accident Insurance Company, The Paul Revere Life Insurance Company, UNUM Life Insurance Company of America and UnumProvident Corporation (collectively referred to as "Defendants") have filed a motion BY [Signature] DEP. CLERK seeking an order quashing multiple subpoenas served upon the plaintiff, Patrick F. McSharry, for the purpose of taking his deposition (Court File No. 3). Plaintiff Patrick F. McSharry has also filed a motion to quash subpoenas (Court File No. 11).

The undersigned magistrate judge held a hearing on the aforementioned motions on Thursday, August 1, 2002. Attorney Jeffrey Rubin in Anchorage, Alaska; Attorney Arnold Levison in San Francisco, California; and Attorney Stan Jacobs in Los Angeles, California participated by telephone. Attorneys Frank Darras, Harry Burnette, Anita Hardeman, Patrick Shea, Susan Lee, Chris Collins, and Angela Ripper participated in person.¹

On June 28, 2002, Dr. Patrick F. McSharry filed a complaint against UnumProvident Corporation ("UnumProvident") in the Hamilton County Circuit Court alleging wrongful termination in violation of the Tennessee Public Protection Act, Tenn. Code Ann. § 50-1-304 and "the public policy of the State of Tennessee." (Complaint at ¶2). UnumProvident subsequently remanded the action to this Court. In his complaint, Dr. McSharry alleges the following:

¹For purposes of this hearing, Attorney Jeffrey Rubin represented David Jakway, Mitchell Burns, Monika Heinschke, Thomas Saldi, Donald Pachuta, Rose Mary Wright, Brett Leavey, Robert Ligorsky, JoAnne Ceimo, and Richard Rosenberg; Attorney Arnold Levison represented Robert Kellman and Randall Chapman; Attorney Stan Jacobs represented Robert Carr, Joyce Kakkis, and Douglas Houston; Attorney Frank Darras represented Susan Chung, Arthur Fries, Howard Lefton, Richard Van Gemert, and Simon Zemel. Attorneys Harry Burnette and Anita Hardeman represented Dr. Patrick F. McSharry; and Attorneys Susan Lee and Patrick Shea represented the defendants. Attorneys Chris Collins and Angela Ripper are in-house counsel for UnumProvident Corporation.

UnumProvident sells policies of insurance against disability from employment and processes claims for disability benefits under these policies made by its own insured clients as well as serving as the administrator for other companies which sell such disability insurance policies. *Id.* at ¶ 5. While employed as associate medical director and medical director for UnumProvident, Dr. McSharry reviewed claims for disability benefits “purportedly to enable it to make valid judgments regarding the disability status of the various claimants.” *Id.* at ¶ 7. However, it was UnumProvident’s “primary practice and policy to deny disability claims,” medical advisors were used only to provide language and conclusions supporting denial of claims, and UnumProvident engaged in other, unethical practices which precluded meaningful review of disability claims by its medical personnel. *Id.* at ¶¶ 11-16. When Dr. McSharry refused to follow these practices, he was terminated from his position with UnumProvident. *Id.* at ¶¶ 20-24.

Apparently, there are a number of individuals across the country who have been denied benefits under a disability insurance policy purchased from UnumProvident or one of its affiliates and/or administered by UnumProvident who now have lawsuits pending against UnumProvident and/or its affiliates arising from the denial of disability benefits. Counsel for these individuals have learned of Dr. McSharry’s lawsuit against UnumProvident and desire to depose him about these alleged policies and practices to deny disability claims. Consequently, according to Dr. McSharry’s attorney, Harry Burnett, he has received over sixty inquiries from counsel throughout the country about taking Dr. McSharry’s deposition. As of Thursday, August 1, 2002, Dr. McSharry had been served at least twenty subpoenas to be deposed in lawsuits brought by individuals against UnumProvident and/or its affiliates for denial of a disability claim. Such individuals shall hereinafter be referred to as “plaintiffs” or “plaintiff.” Dr. McSharry is a resident of Chattanooga, Tennessee, and all of these subpoenas have been issued out of this Court. In an

affidavit, Dr. McSharry avers that he began employment with a new employer on April 1, 2002, does not have leave time accumulated, and could be terminated if required to take off large amounts of time for many depositions.

Consolidated depositions in a number of the plaintiffs' cases were scheduled for August 7, 12 and 21, 2002. Defendants strenuously object to consolidated depositions on the ground that they will be unable to conduct meaningful cross-examination of Dr. McSharry. Defendants are concerned that if this Court allows consolidated depositions to be taken in several or all cases in which subpoenas have been served on Dr. McSharry, then, pursuant to Fed. R. Civ. P. 32(a), Dr. McSharry's deposition testimony will be admissible in the trial of each individual case despite inadequate time to cross-examine Dr. McSharry as to each individual plaintiff's claim. The plaintiffs counter that Dr. McSharry did not review their individual claims, will have no personal knowledge of their individual claims, and they seek to depose Dr. McSharry only for his knowledge of the general policies and practices of UnumProvident in reviewing disability claims. Therefore, plaintiffs assert, the Defendants will have no need to cross-examine Dr. McSharry about the particulars of each plaintiff's disability claim and a single, consolidated deposition will give Defendants adequate opportunity to cross-examine Dr. McSharry.

On the other end of the spectrum, Defendants propose that the undersigned allow only one deposition in one case to go forward at a time in order to give Defendants the time they assert is necessary to adequately cross-examine Dr. McSharry as to the merits of each plaintiff's individual claim for disability benefits. Subsequently, assert the Defendants, if plaintiffs in other cases filed in other courts throughout the country want Dr. McSharry's deposition, then they can either depose him or seek admission of Dr. McSharry's deposition testimony in their respective cases via Fed. R. Evid. 804(b)(1). Requiring Dr. McSharry to be deposed multiple times on the

same subject is unacceptable. As for the other option, one of the plaintiff's counsel astutely noted during the August 1, 2002 hearing before the undersigned that, inevitably, the Defendants will argue that Dr. McSharry's deposition testimony given in one plaintiff's case should not be admissible in another plaintiff's case because the Defendants did not have an adequate opportunity to cross-examine Dr. McSharry as to the present plaintiff's individual disability claim.

Fed. R. Evid. 804(b)(1) allows, in a civil action where the witness is unavailable, the use of deposition testimony given by the witness in another proceeding if the party against whom the testimony now offered, or a predecessor in interest of that party, had an opportunity and similar motive to develop the testimony of the witness by direct, cross, or redirect examination. *See* Fed. R. Evid. 804(b)(1). In many of these cases where the plaintiff seeks to depose Dr. McSharry, Dr. McSharry had no involvement in the decision to deny that particular plaintiff benefits under the insurance policy. Dr. McSharry simply was not assigned to that person's claim. Thus, I do not see how cross-examining Dr. McSharry as to the specific facts of that particular plaintiff's claim would be necessary to provide the defendant(s) with an adequate opportunity to cross-examine Dr. McSharry as required by Rule 804(b)(1). *See* Fed. R. Evid. 602 (a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter). Defendants, of course, disagree. In any event, that is a Gordian knot I cannot completely unravel. The decision as to whether Dr. McSharry's deposition testimony given in one case will be admissible in another case under Fed. R. Evid. 804(b)(1) will be left to the court in which the individual action lies -- and rightly so. That court will have a better understanding of the facts and issues presented in that particular case and will, therefore, be able to make a better evaluation under Rule 804(b)(1). Regardless of this particular dispute, one thing is clear -- Dr. McSharry should not be subjected to numerous depositions concerning the same

subject, *i.e.*, the alleged policies and practices of UnumProvident in reviewing disability claims. It is simply untenable to require Dr. McSharry to be deposed ten, twenty or fifty times or more on the same subject.

Rather than allow a single, consolidated deposition to go forward in all of the twenty cases set forth in the caption above, I will allow a consolidated deposition to go forward in six cases whose respective discovery deadlines have either expired or are close to expiring.

Accordingly, pursuant to Fed. R. Civ. P. 45, Dr. McSharry's and Defendants' respective motions to quash are GRANTED in part and DENIED in part. It is further ORDERED:

- (1) Dr. Patrick F. McSharry shall be deposed in a single, consolidated deposition in the following cases: *Carr v. UnumProvident Corp., et al.*, Docket No. CV-01-07380 (C.D. CAL.); *Chapman v. UnumProvident Corp., et al.*, Docket No. CV-01-2323 (CAL. S.Ct.); *Kakkis v. Provident Mutual Life Insurance Company of Philadelphia, et al.*, Docket No. CV-00-08297 (C.D. CAL.); *Kelly v. The Equitable Life Assurance Society of the United States, et al.*, Docket No. L-04722-01 (N.J. S.Ct.); *Ligorsky v. The Paul Revere Life Insurance Co.*, Docket No. CIV-00-1318 (D. Arizona); and *Zemel v. Provident Life and Accident Insurance Co.*, Docket No. CV-01-00994 (C.D. CAL).
- (2) This consolidated deposition shall take place on Wednesday, Thursday, and Friday of September 4, 5, and 6, 2002 in Chattanooga, Tennessee at an appropriate place chosen by Dr. McSharry's counsel.
- (3) The plaintiffs' attorneys are to choose two or three counsel among them to examine Dr. McSharry on behalf of the six plaintiffs whose cases were chosen for the deposition.
- (4) The defendants in the six cases chosen for the consolidated deposition may cross-examine Dr. McSharry within the scope allowed by the Federal Rules of Civil Procedure.

It is further ORDERED that all remaining subpoenas served on Dr. McSharry for the purpose of taking his deposition are QUASHED. Pursuant to Fed. R. Civ. P. 26(c), the following protective order is entered on behalf of Dr. Patrick F. McSharry:

Except for the case presently pending in this Court, *McSharry v. UnumProvident Corporation*, Docket No. 1:02-cv-208 (J. Edgar), no further depositions of Dr. Patrick F. McSharry concerning his knowledge of UnumProvident's policies and practices in evaluating

disability claims may be compelled pursuant to this Court's subpoena powers without the express, prior permission of this Court. If any party, other than the six specified above, wish to depose Dr. McSharry concerning this subject, that party must petition the Court for permission to do so and show why it is necessary that additional testimony be taken from Dr. McSharry.

SO ORDERED.

ENTER.


UNITED STATES MAGISTRATE JUDGE